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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 391

GEORGE B. PARR, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY TO RESPONDENT'S FURTHER SUPPLEMENTAL MEMORANDUM

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On the eve of this Court's consideration of the petition for certiorari in this case and after the time for filing briefs has expired, the Solicitor General has submitted a statement in square contradiction of the record on a vital matter which is crucial to the petitioners' rights.[1] The Solicitor General advises the Court that, although the testimony of other witnesses was recorded, no transcript of that portion of the grand jury proceedings in which the key prosecution witness Heras testified—which testimony is a principal subject of the petition for certiorari—is in existence. As a consequence of this extraordinary and unprecedented action by the Government the rights of petitioners have been gravely jeopardized.

[1] As a courtesy, the Solicitor General by telephone gave petitioners 24 hours notice that he intended to file his second supplemental memorandum, thus permitting the preparation of this reply.

I

A principal question presented by the pending petition for certiorari is whether petitioners should have been granted access to the transcript of the grand jury testimony of the witness Heras. It is not denied that Heras testified before the grand jury, or that other witnesses' testimony was recorded. Prior to the Government's statement today, there had been no doubt that a transcript of Heras' testimony was in the Government's possession. Indeed, its existence was acknowledged only yesterday, in the first supplemental memorandum filed in this Court by the United States. The District Court was advised that such a transcript existed and the Court of Appeals for the Fifth Circuit based its decision on this assumption. With all due deference we do not believe that the Solicitor General can now ask this Court to act on the basis of his *ex parte* assertion *dehors* the record and contrary to it.

The attorneys for petitioners have no personal knowledge, and no way of ascertaining, whether or not a transcript of Heras' grand jury testimony now exists. The evidence is, however, that such a transcript did exist at the time of the trial. Indeed, the trial judge made a special point of asking Mr. Wilkey, the prosecutor, whether such a transcript was in the possession of the Government. Previously, when defense counsel first moved for production of Heras' grand jury testimony, the following colloquy ensued:

> Mr. Foreman: "We would like to establish the fact that he [Mr. Wilkey] does have this testimony and has it in the courtroom and had it prior to the time the trial started."
>
> Mr. Wilkey: "I do not have it in the courtroom and it is in my office, and until it is—" (R. VIII, 2441).

At a later point in the trial, the trial judge said that he wanted to know for the record whether transcripts of the grand jury testimony of the witnesses Benson and Heras were in the Government's possession, saying, "I ruled against it, but I want to know for the record, is there such a transcript?" (R. X, 3335). Following a discussion as to Benson's testimony, this was the discussion as to Heras:

> "The Court: * * *
> Let me also ask for the record as in the case of the demand made with respect to the Witness Diego Heras, there was a demand for a transcript of his grand jury testimony. Is there such a transcript?"
>
> Mr. Wilkey: "Yes, Your Honor, there is a transcript of the Witness Heras' testimony before the grand jury which returned the indictment in this mail fraud case."
>
> The Court: "Do you have it?"
>
> Mr. Wilkey: "Yes, Your Honor."
>
> The Court: "Very well, sir. Is there anything further, gentlemen?"
>
> Mr. Foreman: "No, Your Honor." (R. X. 3335-3336).

We reiterate that petitioners do not know the facts concerning the assertion by the Solicitor General that no transcript exists of the portion of the grand jury proceedings in which Heras testified. While we appreciate the Solicitor General's candor in seeking to bring out all the facts, the matter cannot be allowed to rest on the basis of his assertions alone, based as they are upon a "grand jury assignment book," which petitioners have not been permitted to see, and the *ex parte*, unsworn recollection of a court stenographer

with respect to events which took place more than three and a half years ago. We therefore insist that, if the Court deems it proper to consider the Government's further supplemental memorandum, petitioners are entitled to a hearing to ascertain the facts as to why a transcript of this particular portion of the grand jury proceedings does not now exist (when the remainder of the proceedings were transcribed), whether a transcript did exist at the time of trial but has subsequently disappeared or been lost, and if it never existed, why misrepresentations were made to the trial court. On a matter so vitally affecting the substantial rights of defendants in a criminal case, a judicial exploration of all the facts is imperative.

II

If the Solicitor General's assertion should be found correct, that fact would not moot petitioners' claim with respect to Heras' grand jury testimony. If petitioners did have a right to use this testimony the trial court could, in the exercise of its discretion, have given petitioners an opportunity to prove that testimony without using a transcript. Rule 6(e) of the Federal Rules of Criminal Procedure permits the trial court to direct members of the grand jury to testify when justice so requires. The Rule reads, in pertinent part:

> ". . . Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. . . ."

And the propriety of testimony by grand jurors is supported by a number of decisions in the federal courts, as well as many in the state courts. *United States* v. *Farrington,* 5 Fed. 343, 346-347 (D.C.N.D. N.Y. 1881); *Atwell* v. *United States,* 162 Fed. 97, 100-101 (4th Cir. 1908); *United States* v. *Perlman,* 247 Fed. 158, 160-161 (S.D.N.Y. 1917); *Schmidt* v. *United States,* 115 F. 2d 394, 396-397 (6th Cir. 1940); *United States* v. *American Medical Ass'n.,* 26 F. Supp. 429, 430-431 (D.C.D.C. 1939).

In short, if a transcript was unavailable and this fact had been made known in the trial court, the petitioners could nevertheless have sought to determine the substance of Heras' grand jury testimony by other means if they were entitled to use that testimony as we assert they were. Accordingly, regardless of what may be true about the transcript, all of petitioners' questions presented in their petition are still before this Court.

III

If it is found to be true that Heras' grand jury testimony is now unavailable either through the medium of a transcript or through other means, a grave new question is presented here which has neither been briefed nor argued. That question is whether the Government may nullify defendants' potential rights with respect to use of grand jury testimony by the simple expedient of making no transcript.

It is by now well established that under some circumstances a defendant in a criminal trial has a right to use grand jury testimony in his defense. E.g., *Pittsburgh Plate Glass Company* v. *United States,*

360 U.S. 395. The Court of Appeals for the Second Circuit has also held that the defense has a right under appropriate circumstances to have the trial court itself examine the transcript for inconsistencies. E.g., *McKeever* v. *United States* and *Zborowski* v. *United States*, (November 10, 1959), discussed in petitioners' reply brief. In addition the Second Circuit has held that the defense has a right to have a court of appeals read the transcript to see whether access to grand jury testimony should have been granted. *Ibid.*[2] Each of these three rights—access, inspection by the trial court, and review—are completely unavailable if grand jury testimony is not recorded so that it can be examined by the trial court and the court of appeals.

Under the facts now asserted by the Solicitor General, neither the petitioners nor this Court can ever ascertain whether petitioners were denied a fair trial because they were not granted access to Heras' grand jury testimony. The full significance of this fact should be weighed by the Court.

IV

It is apparent, from the Solicitor General's statement to this Court, that a grave misrepresentation may have been made during the trial of this case. It is also apparent that this Court is in no position to determine what action the District Court would have taken, or should have taken, had all the facts been known.

If misrepresentations were indeed made to the trial court, if access to grand jury testimony was perma-

[2] The special inquiry by the trial court in this case, as to whether the transcripts of Benson's and Heras' testimony were in existence, would appear to have been for the purpose of ensuring petitioners' right to review of the trial court's grand jury ruling.

nently foreclosed by the Government's neglect to make a transcript of the testimony of this particular witness, and if the trial court never had an opportunity to protect the petitioners in the light of these circumstances, due process of law requires at the very least that the judgment below be vacated and a new trial granted. It is impossible to speculate what the trial court would have done if the facts had been made available. In a criminal case the rights of the defendants cannot be determined by hindsight.

Elementary fairness demands that the petitioners have an opportunity to conduct their defense on the basis of the actual facts when these facts have been developed in accordance with appropriate trial procedures.

Respectfully submitted,

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